STATE OF MICHIGAN

COURT OF APPEALS

In re ASH, Minors.

UNPUBLISHED
March 17, 2015

No. 323516
Lake Circuit Court
Family Division
LC No. 12-001496-NA

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Before: BOONSTRA, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

In this consolidated appeal,[1] respondent-mother and respondent-father appeal by right the trial court's order terminating their parental rights to their two minor children under MCL 712A.19b(3)(c)(*i*) and (*ii*) and (3)(j). Because the trial court properly found that respondent-mother could not provide a safe and stable environment for her children, in docket number 323516 we affirm the portion of the court's order terminating her parental rights. However, because we find the current record inadequate to determine whether the trial court erred in finding that a statutory ground was established by clear and convincing evidence to terminate respondent-father's parental rights, in docket number 323517 we vacate the portion of the court's order terminating respondent-father's parental rights and remand the matter to the trial court for further proceedings relating to respondent-father.

[1] See *In re Ash*, unpublished order of the Court of Appeals, issued September 17, 2014 (Docket Nos. 323516 & 323517).

I. PERTINENT FACTS AND PROCEDURAL HISTORY
A. BACKGROUND FACTS

At the outset of these proceedings, the two minor children lived with respondent-mother and her husband, the children's legal stepfather[2] in Lake County, near the town of Baldwin. Petitioner filed a petition in 2012 asking the court to take protective custody of the children. With regard to respondent-mother and respondent-stepfather, the original petition alleged that beginning in March 2011 and continuing until the court took jurisdiction over the children, Children's Protective Services (CPS) received multiple complaints reporting that respondent-stepfather physically abused the children and that he and respondent-mother locked them in their rooms at night. Subsequent complaints involved respondent-mother and respondent-stepfather leaving medications and lighters within easy reach of the children.[3] As a consequence, the elder child set fire to a couch and to a poster in the children's shared bedroom. It was also alleged that in August 2012, the two left the children unattended in a running vehicle, and that one of the children pressed on the accelerator. With regard to respondent-father, the original petition alleged that he did not exercise his parenting time with the children, lacked transportation,[4] and had recently suffered a stroke. The petition also noted that respondent father had two misdemeanor convictions in 1998 and 2004, and a felony conviction for possession of a controlled substance in 2008. Finally, the petition reported a 1997 substantiated complaint that he had hit his live-in partner's children on the back of the legs with a belt, leaving bruises, and that services were provided at that time, and further that when his cousin hit one of his children with a belt in 2012, "leaving a gash," respondent-father did not do or say anything at the time of the incident.

Respondent-mother and respondent-stepfather pleaded no contest to the allegation that they had left the minors unattended in a running vehicle; the trial court heard additional testimony regarding that incident. Respondent-father indicated that he would not enter a plea, but would not object to the court's taking jurisdiction under the other parties' pleas.[5] The court then asked each respondent individually whether he or she understood that entering a no-contest plea constituted a waiver of his or her right to a jury trial, and each respondent confirmed his or her understanding of, and agreement with, the consequences of his or her plea. The court confirmed with each respondent that he or she understood the full consequences of a no contest

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[2] The stepfather also was initially named as a non-parent adult respondent in Docket No. 323516. We therefore refer to the stepfather as "respondent-stepfather." Respondent-stepfather was later dismissed from the case by the trial court in an order dated October 13, 2013. Respondent-mother testified that her divorce from respondent-stepfather was finalized on March 17, 2014.

[3] These complaints were filed both in Michigan and in Florida, where the family lived from April 2011 until January 2012.

[4] The issue of respondent-father's alleged lack of reliable transportation does not appear to have been addressed during any dispositional hearings or the termination proceedings.

[5] As discussed in Part IV(A) *infra*, we conclude that respondent-father actually entered a no-contest plea.

plea and had not been unduly influenced to enter the plea. The court then entered a no contest plea for each respondent, and named all three in its order of adjudication. In that order, the trial court found that each respondent had been represented by counsel, and that each had entered pleas "knowingly, understandingly, and voluntarily."

B. PROGRESS WITH SERVICES

The children were removed from the home, after which respondent-mother and respondent-stepfather were given psychological evaluations, parenting classes, anger management classes, individual counseling, and supervised parenting time. Respondent-mother participated in all of the classes and counseling sessions offered, and attended all parenting times except for three, which she missed for good reasons and attended upon rescheduling. Caseworkers reported that she seemed to be making progress, but also expressed concerns. Specifically, the children's caseworker expressed concern that respondent-mother tended to disengage during parenting time and let respondent-stepfather do the majority of the parenting, and that she tended to be short with the children and to get upset whenever something happened. It was reported that respondent-father attended parenting time twice a week for two hours each time and, although there were some inconsistencies with discipline, he was doing "really well with the children."

In January 2013, the children's lawyer guardian ad litem (LGAL) filed a motion to suspend respondent-stepfather's parenting time, alleging that respondent-stepfather had made threats to shoot people involved in the case, had made threats during parenting time, and during one visit had "grabbed both children by their collars and held them about six inches away from his face, admonishing the children for calling the foster-mother 'mommy.' " The LGAL also alleged that respondent-stepfather harassed the doctor and his staff at the children's medical appointments, and further that the foster-mother reported that the children do not feel safe around respondent-stepfather, and that "because of his threats to 'shoot people,' she fears for their safety, the safety of her family, and the safety of the other children she cares for."

The hearing on the LGAL's motion was combined with the March 6, 2013 dispositional hearing. The foster mother reported that respondent-stepfather was contentious when he attended the children's medical appointments, that he did not want her in the building when he attended visitation because he thought she looked at him funny, and that when he did attend visitation, the children asked her or her husband to stay and keep them safe from him. The court suspended respondent-stepfather's parenting time until such time as his counselors recommended resumption.

With respect to respondent-father, petitioner recommended a complete physical examination,[6] and substance abuse counseling, the latter simply to confirm that he was clean and to make sure he would get any help he might need to stay clean.

[6] Respondent-father has had a heart attack and a stroke, suffers from diabetes, and struggles with obesity.

The children's counselor reported at the June 5, 2013 dispositional review hearing that respondent-mother and respondent-stepfather had progressed as far as they could in parenting class without allowing respondent-stepfather parenting time. She reported, however, that the elder child's behavior worsened when he began to think that respondent-stepfather was coming back to visit, or that he was going home. The LGAL confirmed that the children told their caseworker and their counselor that they did not want to see respondent-stepfather, and that the elder child had told the foster mother that he would have to "learn to fight again" if respondent-stepfather was going to be around.

With respect to respondent-father, the children's counselor reported that he still needed to work on consistency with respect to discipline, but that his parenting time continued to go well and that the children were bonding with him. She reported that petitioner was awaiting the results of his physical examination to determine whether further services were needed in light of his health. She recommended that respondent-father's parenting time be increased from two hours to five or six hours once a week, and identified the barriers to reunification with the minors as his physical health, his housing,[7] and the fact that he previously did not have a bond with the children (who had been living with respondent-mother and respondent stepfather) and that the children did not seem to think that living with him was an option.

At the August 7, 2013 dispositional review hearing, the children's case manager at Eagle Village reported that, despite extensive services and an increase in parenting time, respondent-mother has not progressed in her parenting skills or anger management. The case manager explained that the children generally behaved well in their foster home, but that they could be unruly after parenting-time visits with either respondent-mother or respondent-father. She said that the children were scared to go home if respondent-stepfather was going to be there. Respondent-mother, however, told the court that she did not understand how anyone could say the children were afraid of respondent-stepfather. Respondent-stepfather stated that no one had proven that the children were afraid of him, and that he had been denied the opportunity to see them and to find out if they really were afraid or just making it up. The court followed petitioner's recommendation that respondent-stepfather no longer be included in the reunification plan.

Petitioner recommended termination of respondent-mother's parental rights at the October 2, 2013 permanency planning hearing. A supervisor at Eagle Village reported that respondent-mother's parenting skills had not improved. She recounted an incident where respondent-mother focused so intently on a DVD player that she did not realize that her children were removing the protectors from the electrical wall sockets. The supervisor reported that the

[7] Specifically, respondent-father's caseworker reported concerns that respondent-father only had a one-bedroom apartment. However, the caseworker reported at a dispositional hearing that respondent-father was willing to obtain a larger apartment if the children were placed with him. By the time of the termination hearing, respondent-father's caseworker reported that respondent-father had "arranged" with his landlord to obtain a larger apartment if the children were placed with him.

children's counselor recommended suspension of respondent-mother's parenting time because she continues to see respondent-stepfather "and the boys are feeling that." The court dismissed respondent-stepfather from the case, but declined to change respondent-mother's placement goal from reunification to termination.

With regard to respondent-father, the supervisor reported that petitioner was still awaiting the results of his physical examination. She noted that respondent-father's health was a concern, and that he struggled to keep up with the children during parenting-time visits, and often sat and directed their play from his seat. She referred to his psychological evaluation, which assessed respondent-father as defensive, and articulated concern that he had a substantial history of substance abuse and a lengthy criminal history. Petitioner recommended that respondent-father follow a recently-outlined treatment plan and engage in reunification services.

However, at the January 8, 2014 dispositional review hearing, the new case manager at Eagle Village recommended that the court change respondent-father's goal from reunification to termination. The case manager reported that respondent-father had tested positive for cocaine in November 2013,[8] that he believes corporal punishment is acceptable, and that he had spanked the youngest child during a recent parenting time visit.[9] The case manager also indicated that respondent-father's health affected his capacity to interact with the children and continued to be a source of concern. At the April 9, 2014 dispositional review hearing, the case manager reported that respondent-father said that he understood that corporal punishment was not appropriate for the minors, but opined that respondent-father's position was aimed at appeasing his children's foster care workers rather than a true change of heart. The case manager continued to recommend termination of respondent-mother's parental rights, although the case manager noted that respondent-mother had divorced respondent-stepfather.

On June 4, 2014, petitioner filed a supplemental petition asking the court to terminate respondent-mother and respondent-father's parental rights. Regarding respondent-mother and respondent-stepfather, the petition added additional allegations related to the incidents discussed above. Regarding respondent-father, the petition added the allegation that he had tested positive for marijuana and cocaine in 2013, and had spanked one of his children during a parenting time visit. The petition also contained the results of the respondents' and children's psychological assessments and notes from service providers regarding respondents, as discussed further *infra*.

C. TERMINATION HEARING

At the termination hearing, Byron Barnes, Ph.D., testified to the results of respondent-mother's psychological evaluation, reporting that she has the intellectual capacity to benefit from services, but was "pretty significantly distressed," suffered from significant long-term

[8] According to respondent-father's attorney, the results of the drug test were so low that it could be explained by casual contact rather than ingestion.

[9] Respondent-father's counsel stated that respondent-father struck the child once on his bottom with an open hand; no injury resulted.

depression, experienced auditory hallucinations, has a hard time regulating and controlling her emotions, and exhibits behavioral responses consistent with diminished coping skills. When asked if he thought she had the ability to parent the children appropriately, Barnes replied that he thought "it would be difficult for her to do it by herself." Barnes said that respondent-father had good intellectual capacity, but suffered from "ongoing, recurrent distress, a lot of anxiety, [and] a lot of depression, resentment, and anger." Barnes stated that respondent-father's depression was not debilitating and would not prevent him from being an appropriate caregiver. He testified that respondent-father had a long-term significant history of cocaine abuse that was in remission, and history of cannabis abuse that was not. Barnes did not recommend placement of the children with respondent-father until he had shown some stability, i.e., refrained from cocaine and cannabis use, received individual counseling, and stayed out of legal trouble.

The children's counselor testified to her concern that although respondent-mother attended and was a willing participant in all services provided, she was not "getting everything that the services were providing." She said that respondent-mother did not take responsibility for the conditions that brought the children under the court's jurisdiction, and surmised that she would not protect the children from exposure to respondent-stepfather. She testified that reunification with respondent-mother was not in the children's best interests because respondent-mother could not provide the stable, safe, and structured environment the children needed.

With respect to respondent-father, the counselor reiterated what she had said in previous dispositional review hearings about his housing, health, and parenting skills. She explained that they had been unable to find suitable skills classes for him in Kalamazoo, where respondent-father lived, or in Baldwin, so the Eagle Village caseworker had worked with him individually during his parenting-time sessions. She said it had taken "quite a while" for him to submit the results of his physical examination, even though he knew it was part of his parent-agency plan. She stated that during the parenting-time visits she observed, he was "very appropriate" with discipline.

The children's therapist testified that both children feared respondent-stepfather, with the elder expressing his concern that respondent-mother would not be able to protect them from him. She reported that the children were attached to respondent-mother and wanted to live with her, but only if respondent-stepfather was not there. She stated that regressions in the children's behavior might be linked to threats to their sense of safety, and stated that they needed consistent stability. She testified that both children told her that respondent-mother had told them to "be bad" at the foster-care home. Regarding the children's best interests, the therapist testified that if their safety and a stable environment could be assured, reunification with respondent-mother would be a possibility.

A counselor with an anger management program who had worked with respondent-mother said that, initially, respondent-mother took no responsibility for the circumstances resulting in the children's removal from her home, but that she had begun to accept limited responsibility toward the end of the 12-week program. The counselor said that she could not speak to whether respondent-mother had applied what she had learned because she never saw her with the children.

The second of the two Eagle Village case managers testified that the primary concern regarding respondent-mother was whether she could separate from respondent-stepfather. He testified that in his conversations with her, respondent-mother never wavered in her denial that the children had suffered abuse. He testified that respondent-mother had stated that petitioner made her separate from respondent-stepfather, but that "once she got her boys back, in a year, when the case is closed, [he] will move back in, and there's nothing they can do about this." He also testified that the goals respondent-mother had set with her counselor after she was supposed to have separated from respondent-stepfather illustrated her continued reliance on him as her main source of support. He concluded that reunification with respondent-mother was not in the best interests of the children. With regard to respondent-father, the case manager said he was concerned primarily about his beliefs regarding corporal punishment, but also noted that respondent-father's health issues "were on the table."

A parent educator at True North Community Services testified that he saw respondent-father seventeen times over a six-month period. He testified that the case managers asked him to work with respondent-father on child management and discipline techniques, focusing primarily on helping him understand why physical discipline was inappropriate for the children, given their past history of abuse by respondent-stepfather. He testified that respondent-father was open to the idea that physical discipline was not appropriate, but that he thought respondent-father struggled with understanding what would take the place of physical discipline. He said that he thought little progress had been made toward respondent-father's service goals, and he did not know if respondent-father would have benefitted greatly from further sessions. When asked if he thought it would be safe to return the children to respondent-father, the educator said that based on the special needs of the children, they might not be able to flourish with just respondent-father as their support system.

Another counselor who worked with respondent-father for six or seven months on substance abuse and parenting issues testified that respondent-father believes he should have the right to use drugs if he needs them, strongly believes people should be allowed to spank their children, and equates spanking with love. She opined that his parenting style was a risk to the children because he does not monitor them and could not monitor them in an emergency because of his health.

D. TRIAL COURT'S FINDINGS AND CONCLUSIONS

After summarizing the children's behavioral issues, the court highlighted some of the testimony regarding respondent-mother's psychological evaluation, emphasizing her emotional distress, long-term depression and anxiety, auditory hallucinations, her difficulties with impulse control, and her dependence on others, respondent-stepfather in particular. Critical to this case, the court said, is the fact that she relies on respondent-stepfather to help her discipline the children. The court observed that although it is legal to spank one's child in Michigan, the experiences of these children made additional corporal punishment inappropriate. Similarly, the court explained that respondent-father's use of corporal punishment would be a very negative thing for the children. The court said respondent-father had been a "non-factor" during most of the children's life, and that the children had formed a faint attachment. The court stated that if the children were placed with respondent-father, he could not meet their special needs, noting that he was dealing with his own health concerns. The court found clear and convincing

evidence to terminate respondent-mother and respondent-father's parental rights under MCL 712A.19(b)(3)(c)(*i*) and (*ii*), and 19(b)(3)(j).

Turning to the best interests of the children, the court acknowledged the parent-child bond between respondent-mother and each of the children, but reiterated the children's fear that they would be exposed to respondent-stepfather. The court also emphasized the children's need for permanency, noting that they had been in foster care for nearly two years and that reunification with respondent-mother or respondent-father was not in sight. The court said that the foster-care parents were providing a much safer and more stable home than either parent could, and concluded that termination of respondent-mother and respondent-father's parental rights was in the best interests of each child.

II. STANDARD OF REVIEW

This Court reviews the trial court's finding that a ground for termination exists under the clearly erroneous standard. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91 (Opinion of CORRIGAN, J.); 126 n 1 (Opinion of YOUNG, J.); 763 NW2d 587 (2009). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich, 624, 633; 593 NW2d 520 (1999). Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

III. DOCKET NO. 323516
A. STATUTORY GROUNDS FOR TERMINATION

Petitioner alleged, and the trial court found, that statutory grounds existed to terminate respondent-mother's parental rights under MCL 712A.19b(c)(*i*), (c)(*ii*), and (j), which provide:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

We find that the trial court did not err in finding clear and convincing evidence to terminate respondent-mother's parental rights under MCL 712A19b(3)(c)(*i*). MCL 712A.19b(c)(*i*) and (*ii*) permit termination "where the children have come within the jurisdiction of the court, and, at a termination hearing at least 182 days later, the court finds that those conditions or other conditions that would bring the children under the jurisdiction of the court are continuing." *In re Sours*, 459 Mich 624, 636; 593 NW2d 520 (1999).

The conditions that led to adjudication were the neglect and physical abuse of the children, and a home environment that created a risk of harm to the children's physical health and mental well-being. The record shows that respondent-mother attended and willingly participated in all the classes and counseling opportunities offered her, and attended all of her parenting-time visitations, either when they were scheduled or in make-up sessions. Although the evidence is mixed, it shows that she made some progress toward applying the parenting techniques that she learned in class at her visitation sessions. Further, the children's counselor reported that on the occasions she observed respondent-mother during parenting time, respondent-mother had an easy rapport with the children, read their cues, and kept them engaged. However, concerns remained. For example, respondent-mother had an emotional outburst at one parenting time session and at another so intently focused on a DVD player that she did not realize the children were removing the protectors from the electrical sockets.

Most significantly, however, the record reflects that respondent-mother was complicit in respondent-stepfather's abuse, including striking the children and locking them in their room. The record shows that respondent-mother consistently denied that the children had been abused. She did not acknowledge or understand how her actions had contributed to an environment that put the children's physical health and mental well-being at risk. She neither grasped the effect that an abusive and neglectful environment had on the children's behavior and emotions, nor comprehended the necessity of protecting them from future physical abuse and mental harm.

It is true that respondent-mother and respondent-stepfather divorced. However, by respondent-mother's own admission, she continued to see respondent-stepfather after the court determined that he could not be part of the reunification plan. Indeed, there was evidence that she planned to reunite with him once the case was over. The fact that respondent-mother apparently planned to continue a relationship with respondent-father, and to rely on his support in her personal life, indicates a lack of awareness or concern regarding how her continued relationship with him would negatively affect her children and their health and well-being. In light of this, the trial court did not err when it found clear and convincing evidence showing that "[t]he conditions that led to the adjudication continue to exist," and that there was no "reasonable

likelihood that the conditions [that led to adjudication] will be rectified within a reasonable time." MCL 712A.19b(3)(c)(*i*).[10]

Further, the trial court did not err in finding statutory grounds to terminate respondent-mother's rights pursuant to § 19b(3)(j). Although respondent-mother takes issue with the trial court's statement that the children "could" be harmed if returned to her care; the trial court's failure to exactly parrot the language of MCL 712A.19b(3)(j) is not fatal to its finding. The court's opinion, when read as a whole, clearly supports a finding that there was a reasonable likelihood that the children would be harmed if returned to respondent-mother. The court stated that a major factor in its decision was that the special needs of the children arose largely from their environment, and specifically from the abuse they had endured there. The court indicated that critical to this case is the fact that respondent-mother relies on respondent-stepfather to help her discipline the children. The court observed that when the children's behavior escalates, respondent-mother and respondent-stepfather respond inappropriately by striking the children and locking them in their room, exacerbating the children's emotional and behavioral problems. The trial court further stated that, while Michigan law does not prohibit parents from spanking their children, corporal punishment was a detriment to these particular children because of their experiences. The court concluded that respondent-mother could not cope with the children or help them resolve their issues without resorting to abuse, and found credible the evidence indicating that respondent-mother had not truly distanced herself from respondent-stepfather, the primary disciplinarian and perpetrator of the abuse against the children. Thus, the trial court's observations clearly indicate the court's finding that, because respondent-mother saw no reason to protect the boys from respondent-stepfather, there existed a reasonable likelihood of physical or emotional harm to the boys if they were reunited with her.

We also disagree with respondent-mother's contention that petitioner did not provide reasonable services to reunify the family. Generally, when petitioner seeks to terminate a parent's rights, it must "make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008), citing MCL 712A.18f; MCL 712A.19(7), and referencing MCL 712A.19b(5). Respondent-mother does not contend that petitioner did not provide her the required case-service plans or updates. Rather, she contends that the services provided were inadequate because respondent-stepfather was not given the opportunity to prove that he had benefitted from services. Her argument is, essentially, that her life is so interwoven with his that he should have been allowed to discover from the children why they were afraid of him, and then been given the opportunity to show that the children they had nothing to fear.

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[10] The trial court additionally made reference to "other conditions" that supported termination, but did not specifically identify them. Thus it is difficult to conclude on the record before this Court that the trial court found that the statutory ground found in MCL 712A.19b(3)(c)(*ii*) was proven by clear and convincing evidence. Because we find that the trial court did not err in finding that MCL 712A.19b(3)(c)(*i*) and (j) were proven by clear and convincing evidence, we need not address whether the evidence also supported termination under (c)(*ii*). See *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009).

The record as a whole shows that family therapy may have had little likelihood of success, or even may have been detrimental to the children's welfare. After numerous services, neither respondent-mother nor the respondent-stepfather comprehended or accepted that the children were afraid of him or that the disciplinary methods he used constituted abuse. Moreover, despite the services provided, the respondent-stepfather continued to react explosively and aggressively when the children did something that displeased him. For example, he once "grabbed both children by their collars" and admonished them for calling the foster mother "mommy." His talk of shooting everyone involved in the case understandably frightened the children, as did any mention that they were going to go home and he was going to be there. It is not merely enough for respondents to receive reunification benefits; they must also benefit from them. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005). The record in this case supports the conclusion that respondent-mother and respondent-stepfather did not benefit from the services they received.

Further, respondent-mother's life may well have been tightly woven with respondent-stepfather's, but this does not mean that petitioner was obliged to continue to work toward reunification with respondent-stepfather once it had been independently determined that it would not be in the children's best interests to do so. Ultimately, respondent-mother's capacity to care for the children had to be independently evaluated. The decision she faced with respect to staying with respondent-stepfather may have been difficult, but it is the best interest of the children that must prevail.

B. BEST-INTEREST DETERMINATION

We also conclude that the trial court did not err in finding that termination of respondent-mother's rights was in the best interests of the children. Although the trial court noted that the children had a bond with respondent-mother, the critical issue for the court was whether she could create a safe and stable environment in which they could recover from the behavioral and emotional effects of past abuse. Record evidence strongly suggests that she is unlikely to be able to create such an environment. Although a relevant consideration, evidence of a bond between children and parent must sometimes give way to concern for the children's safety and stability. See *In re McIntyre*, 192, Mich App 47, 52; 480 NW2d 293 (1991).

IV. DOCKET NO. 323517

Respondent-father argues that the trial court erred in terminating his rights because he had not been adjudicated as an unfit parent and petitioner had not made reasonable efforts to provide him with services to facilitate reunification with the children. We reject his challenge to the adjudication proceedings, but vacate the order terminating his parental rights and remand for further proceedings.

A. JURISDICTIONAL CHALLENGE

As respondent-father accurately notes, the allegations of the initial petition in this matter overwhelming related not to respondent-father, but rather related to respondent-mother and respondent-stepfather. Not seeking the termination of parental rights, the initial petition instead sought jurisdiction over the children and their removal from the home in which they were

residing, pursuant to MCL 712A.2(b)(1) and (2). That home was not respondent-father's, but rather was respondent-mother and respondent-stepfather's.

Nonetheless, the initial petition did include certain allegations against respondent-father, he was a party-respondent at the adjudication hearing, and he was named in the court's order of adjudication. Respondent-father had standing to challenge the trial court's unfavorable ruling, but did not, and he cannot now launch an impermissible collateral attack on the court's exercise of jurisdiction. *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008) (stating that "[o]rdinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights" unless "termination occur[ed] at the initial disposition as a result of a request for termination contained in the original, or amended petition").

However, respondent-father asserts that he is not bound by the prohibition against a collateral attack on the trial court's jurisdiction because "the acceptance by the Court of one-parent [sic] doctrine would have precluded a direct appeal on this issue." See *In re Sanders Minors*, 495 Mich 394, 419; 852 NW2d 524 (2014) (stating that "[a]n unadjudicated parent is not entitled to contest any allegations made against him or her at the other parent's adjudication hearing because the unadjudicated parent is not a party to that proceeding"). We disagree.

The original petition contained allegations that respondent-father had once abused a child in his care (in 1997) and did not do or say anything upon the abuse of one of his children (in 2012) by his cousin, and had a limited criminal history and certain health and transportation issues. Respondent-father appeared before the court with appointed counsel to answer these allegations. Under the circumstances, respondent-father's plea options were to admit the allegations against him, contest them and ask for a trial, or enter a no-contest plea. *Id*. at 405. He did not have the option of refusing to enter a plea of any kind. That the court interpreted his response as a no-contest plea should have been clear when the court asked each respondent individually whether he or she understood that entering a no-contest plea constituted a waiver of their right to a jury trial at which the prosecuting attorney would have to prove some of the allegations, and they would have the right to call witnesses and to cross-examine witnesses. Respondent-father affirmed that he understood the consequences of entering a no-contest plea, and said that he had not been promised anything or coerced into entering his plea. Any remaining uncertainty regarding respondent-father's adjudication status was surely resolved when the court's order named him as an adjudicated respondent, from which order respondent-father did not appeal.

B. STATUTORY GROUNDS FOR TERMINATION

Insofar as they related to respondent-father, the allegations contained in the original and supplemental petitions fell principally into three categories: (1) substance abuse concerns, (2) use of corporal punishment, and (3) respondent-father's own physical health concerns. Regarding substance abuse concerns, the initial petition merely noted that on January 29, 2008, respondent-father pleaded guilty to controlled substance possession less than 25 grams. The supplemental petition more expansively addressed respondent-father's past and possibly continuing use of alcohol and certain controlled substances. However, in its August 13, 2014 ruling, the trial court specifically found that respondent-father had "his substance abuse issues under control."

With regard to the use of corporal punishment, the trial court noted that "[i]t's perfectly legal to spank your kids in this state," but expressed concern that "whupping on them" would not be appropriate for these particular children, due to their past physical abuse while in the care of respondent-mother and respondent-stepfather. The court further noted that respondent-father "might" inflict corporal punishment, but also expressed doubt, given respondent-father's own health issues, that respondent-father "could physically do that."

The court's primary concern appears to be that respondent-father's own health issues would prevent him from effectively parenting the children, particularly because their age and their special needs resulting from their experiences while living with respondent-mother and respondent-stepfather sometimes caused them to be "out of control." However, although there was testimony that respondent remained seated during parenting time sessions, no evidence was presented that respondent was physically or mentally unable to parent his children. In fact, his counselor indicated that his issues with depression would not prevent him from being an effective parent, and his psychological evaluation indicated that his moderate level of depression was "primarily over concerns for his children." Nor was there testimony that respondent's physical limitations of diabetes and a history of heart attack and stroke rendered him unable to parent his children.

The court's opinion that respondent-father could parent the children if they were older and well-behaved suggests that respondent-father's parental rights were terminated because the court felt that he could not provide proper care and custody, and that it would therefore be in the best interest of the children to do so. We think it important, however, that termination decisions be made in the context of the statutory grounds alleged in the initial and supplemental petitions, or that an appropriate record be established as to the applicability of any other statutory grounds. Further, while the trial court properly noted that the interests and considerations were different as between respondent-mother and respondent-father, and that respondent-father was not present for, or the cause of, the trauma experienced by the children, the court did not independently articulate—as between respondent-mother and respondent-father—the statutory grounds on which it was relying in terminating each of their parental rights.

We reiterate that the statutory grounds under which termination was sought (in the supplemental petition) and ordered by the trial court were MCL 712A.19b(3)(c)(*i*) (the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age), (3)(c)(*ii*) (other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age), and (3)(j) (there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent).

Moreover, as discussed earlier in this opinion, the conditions that led to the adjudication related principally to respondent-mother and respondent-stepfather, and only incidentally related to respondent-father's past use or tolerance of corporal punishment and history of controlled substance use.[11] In these circumstances, respondent-father clearly cannot be held accountable for, or obliged to rectify, the conditions that did not relate to him or his care. Regarding corporal punishment, respondent-father also cannot be expected to undo the two identified past acts of use or tolerance of corporal punishment, and the only new such allegation related to a single incident of what was described as an open-handed slap on the bottom of one of his children, combined with respondent-father's expressions of belief that spanking (which the trial court itself observed to be legal) can be an appropriate form of discipline. Regarding controlled substance use, the trial court found that respondent-father had these issues under control, although we glean from the record that continued assurances in that regard would be appropriate. For these reasons, we are unable to find that the trial court properly terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*i*).

The trial court further found, presumably in reference to MCL 712A.19b(3)(c)(*ii*), that there were "other conditions" that had not been rectified, and that there was not a reasonable likelihood that they would be rectified within a reasonable time. However, the court did not identify any such "other conditions," nor did it direct its finding in any way to respondent-father. Therefore, we are unable to find that the trial court properly terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*ii*). Since, as noted below, we are remanding this matter to the trial court for further proceedings on other issues, the trial court may also, on remand, articulate any such "other conditions" that it believes to have been established by clear and convincing evidence, and its findings regarding the evidentiary basis for terminating respondent-father's parental rights under MCL 712A.19b(3)(c)(*ii*),

The trial court additionally relied on MCL 712A.19b(3)(j) in terminating respondent-father's parental rights. However, that section requires a showing, by clear and convincing evidence, that the children are likely to be harmed if returned to the home of the parent. With due regard for the trial court's concern that corporal punishment would negatively affect these children in light of their past experience and resulting special needs, we cannot find from the description of a single open-handed slap on the bottom of one of the children (particularly when coupled with the trial court's own expression of doubt as to respondent-father's physical ability to inflict corporal punishment should he wish to do so, and particularly given that the past abuse of the children resulted not from respondent-father, but instead from respondent-mother and

[11] It bears reminding that the initial petition presented the barest of allegations regarding respondent-father, and instead sought removal of the children from the home of respondent-mother and respondent-stepfather pursuant to MCL 712A.2(b)(1) and (2) based on the conditions existing in their home. The trial court's concern relating to respondent-father's own physical health issues relates to subject matters addressed principally in the supplemental petition (the initial petition only indicating that it had been "reported" that respondent-father had suffered a stroke), and therefore does not appear to have been a concern that gave rise to the adjudication resulting from the filing of the initial petition.

respondent-stepfather) that sufficient clear and convincing evidence exists MCL 712A.19b(3)(j) to show a reasonable likelihood of harm to the children if they were placed with respondent-father. However, we find that the current record is insufficiently clear regarding the bases for the trial court's determination under MCL 712A.19b(3)(j). Therefore, we remand this matter to the trial court for a clear articulation of its findings under that subsection, insofar as it relates to respondent-father only, and a description of the evidentiary basis for those findings.

Moreover, we note that while the allegations regarding respondent-father did not include other statutory grounds, such as MCL 712A.19b(3)(g) (parent fails to provide proper care and custody and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age), the record suggests that the trial court's decision to terminate respondent-father's parental rights may have been based on the considerations underlying that subsection. In fact, in such circumstances, respondent-father's own physical health issues might factor into the termination equation in a more significant way. In that event, while the existing record indicates that respondent-father was given certain services, if in fact he suffers from such severe physical disabilities that he cannot effectively parent his children, such issues should be, or have been, addressed in his service plan. See *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (1999). We therefore additionally remand this matter to the trial court for its specific findings regarding whether the requirements for termination under MCL 712A.19b(3)(g) are satisfied, including whether, given respondent-father's own physical health issues, he desires to be a custodial parent and is capable of proving proper care and custody to the children within a reasonable time considering their age. If the trial court determines that those conditions are satisfied, it may order such additional services to respondent-father as it deems appropriate.

The trial court also should evaluate on remand the current circumstances insofar as they relate to any continued drug use by respondent-father, or the likelihood of the children being exposed to drug use or the drug culture as a consequence of placement with respondent-father, and should include among its findings its assessment of those circumstances in relation to MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j).

For all of these reasons, we vacate the trial court's determination that the statutory grounds alleged for termination of respondent-father's parental rights were proven by clear and convincing evidence, and we remand for further proceedings consistent with this opinion. We therefore do not address the trial court's best-interest determination insofar as it relates to respondent-father. See MCR 3.977(F)(1).

V. CONCLUSION

With respect to respondent-mother, the trial court did not err in terminating her parental rights pursuant to MCL 712A.19b(3)(c)(*i*) and (j), and by finding termination to be in the best interests of the children. We also conclude that petitioner fulfilled its statutory obligation to make reasonable efforts to reunify her with her children before her rights were terminated.

With respect to respondent-father, we conclude that because respondent-father could have directly appealed the court's exercise of jurisdiction in its order of adjudication, he cannot now collaterally attack the court's jurisdictional decision in his appeal of the court's order

terminating his parental rights. However, for the reasons stated, we vacate that portion of the order terminating respondent-father's parental rights, subject to further proceedings consistent with this opinion.

Affirmed in docket number 323516. Vacated in docket number 323517, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Peter D. O'Connell